

FEDERAL CIRCUIT COURT OF AUSTRALIA

KUMAR v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 3161

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migrants and Refugees Division) – whether the Tribunal failed to have regard to the relevant requirements of reg.1.15A of the *Migration Regulations 1994* – whether the Tribunal failed to have regard to relevant considerations – whether the Tribunal failed to put adverse information to the applicant – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 476

Migration Regulations 1994, reg.1.15A

Applicant:	RUPESH KUMAR
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1692 of 2015
Judgment of:	Judge Street
Hearing date:	26 November 2015
Date of Last Submission:	26 November 2015
Delivered at:	Sydney
Delivered on:	26 November 2015

REPRESENTATION

Counsel for the Applicant:	Mr J R Young
Solicitors for the Applicant:	Shamser Thapa & Associates
Counsel for the Respondents:	Mr M Cleary
Solicitors for the Respondents:	Australian Government Solicitors

ORDERS

- (1) The application is dismissed.
 - (2) The Applicant pay the costs of the First Respondent fixed in the amount of \$6500.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1692 of 2015

RUPESH KUMAR

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Tribunal made on 28 May 2015 affirming the decision of the delegate not to grant the applicant a Partner (Temporary) Class UK visa.
2. The applicant applied for the visa on 21 March 2012. The delegate refused to grant the visa on 3 February 2015 on the basis the applicant did not satisfy cl.820.21 at the time of application because the delegate was not satisfied that the applicant was the spouse of the sponsor as well as holding that the criteria under cl.820.22 at the time of decision were not met.

3. Relevantly, the Tribunal identified the requirements of s.5F of the *Migration Act 1958* and also reg.1.15A in its reasons. The Tribunal summarised the criteria that the applicant must meet to be a “spouse” within the meaning of the regulations. The applicant and the sponsor commenced the relationship on 15 February 2012 and got married on 16 March 2012. On 11 February 2013 the sponsor indicated the relationship was over and withdrew her sponsorship of the applicant’s application. The applicant on 18 April 2013 advised the Department that the relationship had broken down due to the sponsor’s gambling addiction and alleged the applicant had been the victim of family violence. Relevantly, the delegate found (CB101):

...I am unable to establish that the relationship between you and the sponsoring partner had the elements of a genuine and continuing relationship as specified in Regulation 1.15A at the time you made this application.

4. On 15 January 2015 the Tribunal sent a letter inviting the applicant to appear to give evidence and present arguments at a hearing to be held on 25 March 2015. The applicant appeared on that date to give evidence and present arguments and the Tribunal also received evidence from a witness. Prior to that hearing, a legal representative on behalf of the applicant sent submissions to the Tribunal dated 17 March 2015 that squarely recognised and put submissions on the issue of whether there was a genuine continuing relationship.
5. After the hearing on 31 March 2015 the Tribunal invited the applicant to respond to information that the Tribunal identified was information, if relied upon, would be the reason or part of the reason for finding that the applicant was not in a genuine and continuing relationship at the time of the application as required by s.5F of the *Migration Act 1958*. The applicant was given an opportunity to respond to that material on or before 14 April 2015. Further material in response was provided by the applicant to the Tribunal which was referred to in para.35 of the Tribunal’s decision.
6. Leave was granted to file an amended application raising the following grounds:

1. The Second Respondent made jurisdictional error by deciding that the Applicant and his Sponsor were not in a married

relationship as defined by section SF (2) of the Migration Act 1958 without having regard to all of the matters made mandatory by Reg.1.1 SA(2).

Particulars

a) The Second Respondent did not consider the matters in :

Reg.1.15A (3)(a): (iii), (iv) and (v)

Reg.1.15A (3)(b): (ii), (iii)

Reg.1.15 (3) (c)

Reg. 1.15A (3)(d)

2. The Second Respondent made jurisdictional error by making a decision based only upon the motivation of the Sponsor for financial gain.

2A. In making a decision that the Sponsor entered into the marriage for financial gain, the Second Respondent made a finding on a critical matter in respect of which there was no evidence or other material to justify the making of the finding.

2B. The Second Respondent made jurisdictional error by assuming that a marriage entered by one of the parties for financial gain is, by reason of that fact alone, not a genuine and continuing spousal relationship.

2C. The Second Respondent made jurisdictional error by failing to consider the Applicant's family violence claim in circumstances where it was mandatory for the Second Respondent to have regard to the duration of the relationship.

3. The Second Respondent denied the Applicant procedural fairness by failing to inform him of any suggestion that the Applicant had not entered or intended to enter a genuine relationship.

4. The Second Respondent based its decision on irrelevant or irrational considerations related exclusively to the motivation of the Sponsor or her desire to use the Applicant for her benefit.

7. Counsel for the applicant focused upon the finding of the Tribunal in para.28 which is as follows:

28. The Tribunal has considered Mr Kumar's claimed family violence. The Tribunal on the evidence is satisfied that the parties shared a sexual relationship. The Tribunal is not satisfied that the parties shared a spousal relationship. The Tribunal on the evidence from the visa applicant and the witnesses is satisfied that the sponsor entered into the marriage for financial gain and that the parties' relationship was not a genuine and continuing spousal relationship.

8. Counsel also referred to the finding of the Tribunal in para.18 as follows:

18. The Tribunal must consider all the circumstances of the relationship (including the matters specified in r.1.15A) in determining whether the parties are in a "married relationship" as defined by s.5F(2). The Tribunal has had regard to the parties' financial relationship; the nature of their household; the social aspects of the relationship; and the nature of their commitment to each other. On these aspects the Tribunal has considered all the evidence before it and is satisfied the facts of this case are as follows:

9. The decision of the Tribunal dated 28 May 2015 had attachment "A" pages 11 and 12 of 12 pages . Every page was marked as being one page number out of 12. The attachment "A" comprised reg.1.15A. I am satisfied that on a fair reading of the Tribunal's decision that attachment "A" formed part of the decision of the Tribunal.
10. Contrary to the applicant's submissions, I find the Tribunal clearly had regard to the requirements which were made mandatory by reg.1.15A. The Tribunal acknowledged those mandatory requirements in para.18. It is not necessary for the Tribunal to individually address each of the subcategories in its reasoning, provided it has had regard to each of those subcategories. On a fair reading of the Tribunal's decision there is no basis to infer that the Tribunal did not have an intellectual engagement with and have regard to each of the mandatory matters identified in reg.1.15A. Ground 1 fails to make out any jurisdictional error.
11. In relation to ground 2, the substance of the applicant's argument was that the finding of there being no genuine and continuing spousal relationship was, in substance, because of the finding that the sponsor had entered into the marriage for financial gain. The Tribunal's reasons

do not express that limitation in relation to the finding made by the Tribunal. On a fair reading, it cannot be said that the Tribunal's decision of there being no genuine and continuing spousal relationship was based only upon the motivation of the sponsor for financial gain. Nor, on a fair reading can it be said that the motivation of the sponsor was substantially the basis for the Tribunal's conclusion. It is clear that the Tribunal took into account a combination of matters as identified in paras.8, 9, 10, 11, 12, 19, 22, 23, 24 and 27, as well as the findings made in the third sentence of para.28. Ground 2 fails to make out any jurisdictional error.

12. In relation to ground 2A, it is clear from the matters identified in paras.22, 23 and 24 that it cannot be said there was no evidentiary basis for the adverse finding in relation to the motivation of the sponsor entering into the marriage for financial gain. No jurisdictional error is made out by ground 2A.
13. In relation to ground 2B, counsel for the applicant contended that the finding as to the relationship not being a genuine and continuing spousal relationship, in essence, was because of one party having the intention to obtain financial gain. I accept counsel for the applicant's submission that if, in fact, the finding had been so confined that may give rise to a jurisdictional error. However, it is clear from the language in the reference to "the parties" and a fair reading of the Tribunal's reasons that the finding of no genuine and continuing relationship was not so confined. Ground 2B fails to make out any jurisdictional error.
14. In relation to ground 2C, counsel for the applicant contends that the circumstances of the relationship within reg.1.15A(2) as well as the requirements of subreg.(3)(d)(i) required the family violence to be the subject of findings in the context of the duration of the relationship in the present case. The Tribunal relevantly said:

29. The Tribunal on the evidence is not satisfied that a spousal relationship existed between Mr Kumar and Ms Naidu. Accordingly Mr Kumar cannot satisfy cl.820.211(2). Therefore, the Tribunal has not considered Mr Kumar's claimed family violence further.

15. It is clear from the Tribunal's reasons at paras.11, 12, 25 and 27 that the issue of violence in the relationship had been taken into account so far as the requirements of reg.1.15A(2) and subcl.(3)(d)(i) are concerned. Given that the Tribunal decision must be read as a whole, the duration of the relationship was squarely identified in paras.8 and 9. Where the Tribunal has found there is no genuine relationship, it is not necessary for the Tribunal to go on to determine the issue of family violence. The Tribunal was correct not to do so. There was no error of the kind identified in ground 2C.
16. In relation to ground 3, it is clear from the decision of the Tribunal that the question of a genuine relationship at the time of the application was a live issue on the face of the determination of the delegate. That live issue was clearly apparent from the fact that the legal representative of the applicant addressed that matter in the submission letter prior to the hearing on 17 March 2015. I also accept the first respondent's submissions that the letter dated 31 March 2015, made clear the question of whether there was a genuine and continuing relationship at the time of the application was a live issue. Ground 3 fails to make out any jurisdictional error.
17. In relation to ground 4, I accept the first respondent's submission that the motivation of one spouse is relevant in light of reg.1.15A(2) given the reference to all of the circumstances as well as being relevant under reg.(3)(d). This is not a case in which it can be said that the adverse finding of the Tribunal was based exclusively or substantially on the motivation of one sponsor. Ground 4 fails to make out any jurisdictional error. The amended application is dismissed.

I certify that the preceding seventeen (17) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 30 November 2015